

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN M. EVANS : DETERMINATION
for Redetermination of a Deficiency or for :
Refund of New York City Personal Income Tax
under Chapter 46, Title T of the New York City :
Administrative Code for the Years 1985 and 1986.

Petitioner, John M. Evans, 3225 Gallows Road, Fairfax, Virginia 22037, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under Chapter 46, Title T of the New York City Administrative Code for the years 1985 and 1986 (File No. 806515).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 21, 1990 at 1:15 P.M., with all briefs to be submitted by July 13, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUES

I. Whether petitioner maintained a permanent place of abode in New York City so that the Division of Taxation properly treated him as a New York City resident liable for City personal income tax.

II. Whether penalties imposed against petitioner should be abated.

FINDINGS OF FACT

Petitioner, John M. Evans, an attorney, was employed during the years at issue by Mobil Corporation in its midtown Manhattan offices as supervisory tax counsel in the office of tax counsel.

Petitioner timely filed City of New York nonresident earnings tax returns on Form

NYC-203 and reported and paid earnings tax of \$496.41 on gross wages and other employee compensation of \$109,503.36 and earnings tax of \$532.35 on gross wages and other employee compensation of \$118,300.00 for 1985 and 1986, respectively. On both returns, petitioner checked off the box "No" in response to the query, "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?"

The Division of Taxation issued a revised Statement of Personal Income Tax Audit Changes dated August 25, 1988 showing additional tax due of \$2,944.58 plus penalty and interest and of \$3,297.06 plus penalty and interest for 1985 and 1986, respectively. The following explanation was provided:

"Taxpayer is deemed to be New York City Statutory Resident in accordance with New York State Tax Law, Section 1305(a)(2)."

Therefore, according to the Division of Taxation, petitioner was liable for the higher New York City personal income tax and not the lower nonresident earnings tax.¹

The Division of Taxation then issued a Notice of Deficiency dated November 4, 1988 asserting tax due of \$6,241.64 plus penalty and interest.

The auditor spent 25 hours on the audit, interviewing petitioner (whom he described as cooperative) two or three times in person and speaking with petitioner over the telephone many times. According to the auditor's report, petitioner maintained a permanent place of abode within New York City because he shared a Manhattan apartment with a friend and paid "different household expenses", and "[t]hese living arrangements have been in existence since he moved out from his rented apartment [in Manhattan] in 1978."

The Division of Taxation conceded that petitioner was domiciled in Pawling (Dutchess

¹During the years at issue, the tax rate for New York City nonresident earnings tax on wages was .45% and for New York City nonresident earnings tax on net earnings from self-employment was .65%. (In 1985, petitioner reported a small amount of income, \$560.00, which he had earned as a religious educator which was subject to the higher rate.) In contrast, the tax rate for New York City personal income tax was substantially higher, \$675.00 plus 4.3% on excess over \$25,000.00 for each of the years at issue.

County), New York during the years at issue. At the hearing herein, the Division's representative withdrew the argument asserted in the answer that petitioner was domiciled in New York City during the years at issue. Nonetheless, petitioner introduced much evidence to establish that he changed his domicile to Pond Cottage, Quaker Hill Road, Pawling (Dutchess County), New York in the spring of 1978, and that this Pawling residence remained his domicile up to the date of the hearing.²

Petitioner purchased the Pawling residence in December 1976. However, it was not until the spring of 1978 that it became his domicile when he vacated his rental apartment in Manhattan. Nevertheless, petitioner continued to live in Manhattan during his workweek at the rectory of the Church of the Good Shepherd (hereinafter "Good Shepherd"), an Episcopalian church located at 236 East 31st Street.

In the spring of 1974, petitioner became acquainted with Father Vincent Alfred Ioppolo, who at the time was a Roman Catholic priest in the Philadelphia archdiocese. In January 1975, Father Ioppolo moved from Philadelphia to Manhattan intending to apply to the Episcopal Diocese of New York for acceptance into its priesthood. For about a year and a half, Father Ioppolo lived at petitioner's Manhattan apartment until he moved to the curate's apartment at St. Peter's Church in the Bronx where he was employed as an assistant priest. In March 1978 (after serving for a brief time as an assistant priest to the Church of the Ascension in Manhattan), Father Ioppolo was offered the position of rector at the Good Shepherd. In May 1978, he took up residence in the rectory of the Good Shepherd. At about the same time, petitioner took up residency during his workweek in the rectory at Father Ioppolo's invitation. This living arrangement continued for 12 years.

The rectory is a four-story brownstone building next to the church. The church office and rector's study is on the ground floor with a garden behind. The next floor has a kitchen,

²Petitioner recently notified the Division of Tax Appeals that his business address has changed from Manhattan to Fairfax, Virginia, which is near Washington, D.C.

dining room, outer room, and sitting room. Five bedrooms are located on the top two floors. As rector of the Good Shepherd and as part of his compensation, Father Ioppolo was provided with the exclusive use of the living quarters in the rectory. The space in the rectory used as a church office had a separate entrance from the living quarters.

Petitioner occupied a bedroom on the top floor of the rectory which he described as follows:

"There is a bath there. There are bookshelves for books. There is a desk. There is a bed. There are two lamps on either side, a sofa and a television."

The proposed findings of fact submitted by petitioner include the following:

"Petitioner's status in the rectory was that of a houseguest with no more than an instantly revocable invitation to be on the premises."

Although this proposed finding is technically correct,³ petitioner did testify that his living in the rectory began in 1978 and had continued to, at least, the date of the hearing herein. It is difficult to merely describe this living arrangement as that of a mere houseguest, albeit such description is technically correct. In contrast to petitioner's proposed finding, the auditor, in his testimony, described petitioner and Father Ioppolo as partners who shared household expenses.

Father Ioppolo testified that he handled household expenses "since it is my household." On a regular basis, mostly monthly or bi-monthly, Father Ioppolo "would submit to petitioner the expenses and he would bear half of it." The shared expenses included expenditures at supermarkets for food, toiletries, and household cleaning products, and the expenses incurred in paying a housekeeper to clean the living quarters of the rectory on a regular basis. For 1985, petitioner and Father Ioppolo shared household expenses in the amount of \$7,014.00, and for 1986, household expenses of \$5,770.00 were divided up. (Some small portion of these amounts apparently also included petitioner's payment of personal telephone charges.)

³There was no lease or any other agreement between petitioner and Father Ioppolo or between petitioner and the Good Shepherd parish for petitioner to compensate either Father Ioppolo or the parish for his use of the rectory, nor did petitioner ever make any such payment.

Further, petitioner furnished the living quarters of the rectory with some of the furniture from his Manhattan apartment including a desk, a wing-back chair and a drop-leaf table. He also purchased furnishings for the rectory including, according to the testimony of Father Ioppolo, "a settee, mirror, two regency chairs, dining room furniture, a lot of things."

Consequently, it is reasonable to find that petitioner and Father Ioppolo shared a household.

Petitioner did not hold himself out as living at the rectory and did not use the rectory as his address. In fact, the Manhattan telephone directory for 1987 shows petitioner's Pawling address and phone number, and petitioner testified that this same information had been contained in the Manhattan directory since 1979.

Petitioner conceded that he spent in the aggregate more than 183 days of each of the years at issue in New York City.

Petitioner submitted 12 proposed findings of fact. Proposed findings of fact "1", "2", "3", "4", "5", "6", "7", "9", "10", and "11" are accepted and incorporated into this determination.

Proposed findings of fact "8" and "12" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "8" includes an inexact statement that Father Ioppolo frequently had guests stay for lengthy periods of time, including petitioner. By the date of the hearing herein, petitioner had lived in the rectory for 12 years. There is no evidence in the record that any other person lived in the rectory for such a lengthy period. Father Ioppolo did testify that he "had a number of priests and laymen who were friends of mine come and stay and live for a time, the most recent being Father George Brant, who...stayed with me for fifteen, sixteen months", and that he "had a friend who lived in Rome, and he came and stayed for...a year and a half or something like that." Nonetheless, it is imprecise to place petitioner in the same category as these other guests.

(ii) Proposed finding of fact "12" includes an inexact statement that "[p]etitioner's status in the rectory was that of a houseguest with no more than an instantly revocable

invitation to be on the premises." As noted in Finding of Fact "11", this statement is inexact and does not adequately describe the relationship between petitioner and Father Ioppolo, although it might be accurate in terms of petitioner's legal right to live in the rectory.

Petitioner has also proposed five conclusions of law. However, there is no requirement in the law or regulations to rule on them (State Administrative Procedure Act § 307[1]).

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that the statutory requirement that the taxpayer maintain a permanent place of abode in New York City requires that the taxpayer bear the expense of the residence. It is not enough that a taxpayer occupies an abode for an extended period of time. He further contends that the statutory requirement that the taxpayer maintain a permanent place of abode was not met because he lived at the Manhattan address at the invitation of a friend, who had the right to ask him to leave "at any time on a whim by his host".

In contrast, the Division of Taxation asserts that based upon the precedent of Matter of Brazin (State Tax Commission, January 24, 1983), a taxpayer may be viewed as maintaining a place of abode "regardless of whether the taxpayer paid for the upkeep of such quarters." It is enough that the taxpayer occupies the abode. The Division of Taxation rejects petitioner's argument that the rectory living quarters were not permanent because petitioner lived there for "over a decade", and he moved numerous items into the living quarters of the rectory.

CONCLUSIONS OF LAW

A. During the years at issue, Article 30 of the Tax Law enabled the City of New York to enact a personal income tax for such years. New York City, by local law #36, enacted Chapter 46, Title T of the Administrative Code of the City of New York (hereinafter "Administrative Code") which imposed New York City personal income tax on residents of New York City during these years.

Administrative Code § T46-105.0 provides the definition of "[c]ity resident individual". The definition, in relevant part (since the parties have agreed that petitioner is domiciled outside of New York City), is that a resident individual means an individual:

"who is not domiciled in this city but maintains a permanent place of

abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city...."

B. The New York City personal income tax imposed by Chapter 46, Title T of the Administrative Code is, by its own terms, tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, prior cases involving whether a person was a resident of New York State and liable for State personal income tax are relevant to this determination.

C. It is observed that the definition of resident individual at issue herein requires that a two-part test be applied to determine whether petitioner was properly treated as a New York City resident individual: (1) maintenance of a permanent place of abode and (2) more than 183 days spent in New York City during each of the years at issue. Petitioner, as noted in Finding of Fact "13", supra, has conceded that he spent more than 183 days in New York City during each of the years at issue. Therefore, the focus is on the first part of the test: whether petitioner maintained a permanent place of abode in New York City.

D. Permanent place of abode is defined in the income tax regulations at 20 NYCRR 102.2(e)(1) as:

"[A] dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

E. The Division of Taxation relies upon the State Tax Commission decision in Matter of Brazil (supra):

"In Brazil the petitioner successfully argued that he was not a resident of New York State by virtue of his maintenance of a personal place of abode in another jurisdiction.... In the instant case the Division of Taxation would rely upon analysis in Brazil and its interpretation of the word 'maintain' to mean to keep effective or occupy."

In reaching its decision in Brazil, the State Tax Commission made a serious mistake misciting the dissent in Matter of Rothfeld v. Graves (264 App Div 54, 34 NYS2d 895, affd 289 NY 583) as the majority's holding. The State Tax Commission stated as follows:

"In the Matter of Rothfeld v. Graves [citation omitted], where a claim for refund was denied after an informal hearing on the ground that maintenance by someone else of a place of abode, in which an incompetent domiciliary of the State of New York is cared for, was not sufficient compliance with the statute to relieve the petitioner from

taxation, the court held that:

'It is certain that Alfred Rothfeld was domiciled in the State of New York where his committee was appointed and where they lived. It is also clear that he maintains no permanent place of abode within the State but there is maintained for him (emphasis supplied) a permanent place of abode without the State [in Massachusetts] and that he does not spend in the aggregate thirty days of a taxable year within the State.

He is entitled to the exemption that he claims and the determination under review should be annulled."

Rather than representing the holding of the court in Matter of Rothfeld v. Graves (supra), the language quoted by the State Tax Commission is from the dissenting opinion of Justice Crapser. The holding in the case, in fact, was that the so-called "incompetent" did not maintain a permanent place of abode in Massachusetts:

"The fact that he lives there [in Massachusetts] is due solely to considerations personal to his paid attendant, and this is insufficient to satisfy the statute, the intent of which is to include only an abode outside the state deliberately and permanently maintained by the one who is to be relieved of tax liability" (Matter of Rothfeld v. Graves, supra, 34 NYS2d at 897) (emphasis added).

F. In order to treat petitioner herein as a resident of New York City for New York City income tax purposes, it is not enough that he occupy an abode in New York City. He must also permanently maintain a New York City abode, and petitioner has shown that he does not maintain a permanent place of abode in New York City. Rather, the living quarters in the rectory of the Good Shepherd constitute the permanent place of abode maintained by Father Ioppolo.

G. In Mackall v. Bates (278 App Div 724, 103 NYS2d 31), the court held that a taxpayer living in Washington, D.C. maintained a permanent place of abode in New York City because his wife lived in a New York City apartment, and the taxpayer made contributions to his wife's general support and continued to have access to the New York City apartment. In contrast, petitioner clearly is not making contributions to the general support of Father Ioppolo. Rather, petitioner and Father Ioppolo have independent finances except to the extent that petitioner shares certain household expenses as detailed in Finding of Fact "11", supra.

H. Furthermore, the matter at hand is dissimilar from the situation wherein a taxpayer, domiciled outside of New York City, may be treated properly as a resident of New York City because he rented an apartment in New York City which constituted the maintenance of a permanent place of abode in New York City (Matter of Fresne, State Tax Commission, March 14, 1985; see, Matter of Gilgore, State Tax Commission, April 6, 1987).

I. In sum, the availability to and actual use by petitioner of the rectory as a place of abode during the years at issue was insufficient to transform the rectory into a permanent place of abode maintained by petitioner.

J. The petition of John M. Evans is granted, and the Notice of Deficiency dated November 4, 1988 is cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE